CONSUMERS' CHECKBOOK

Center for the Study of Services

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Press Release

Court Ruling Would Deny Public Powerful Health Care Information

If New Court Decision Stands, Public Will Be Denied a Powerful Tool for Assessing the Performance of the Medicare Program and the Quality of Physicians

On January 30, 2009, the U.S. Court of Appeals for the DC Circuit issued a ruling that, if allowed to stand, would drastically curtail the public's ability to assess the quality and efficiency of physician services delivered to Medicare enrollees—and, in turn, would limit the public's ability to assess the performance of the Medicare program itself.

In August 2007, Consumers' CHECKBOOK/Center for the Study of Services, a nonprofit consumer research and information organization, won a Freedom of Information Act (FOIA) lawsuit. The U.S. District Court for the District of Columbia ordered the U.S. Department of Health and Human Services to release certain data from the records of every physician claim paid by Medicare. The data to be released would not include any information that could be used to identify patients.

At that time, CHECKBOOK/CSS announced that it would use the information to create a resource, free to the public, on its www.checkbook.org website, that would report the number of various types of major procedures performed by each physician and reimbursed by Medicare, "so a consumer selecting a physician for a knee replacement or prostate surgery or other major procedure will be able easily to check that a physician has an appropriate level of experience," said Robert Krughoff, CHECKBOOK/CSS's president.

CHECKBOOK/CSS also announced that it would expect leading health plans, those with a strong consumer-information focus, to collaborate with it, pooling their data with the Medicare data to create an even more comprehensive procedure count for each physician. For many types of procedures, there is strong research evidence that experience matters, as documented, for example, in **"**Success Rates for Prostate Cancer Depend on Experience of Surgeon," published in July 2007 in the *Journal of the National Cancer Institute*.

The data would also allow the public to assess Medicare's performance in improving the quality and efficiency of the care provided to Medicare beneficiaries and the general public. The data would enable the public to assess how well the Medicare program is addressing problems like the following—

- Large numbers of patients who have high-risk procedures done by physicians with a sub-optimal amount of experience performing such procedures.
- Substantial numbers of physicians performing large numbers of high-risk procedures even though they are not trained or certified to do those procedures, have a record of poor results or even professional sanctions related to those procedures, or have conflicts of interest related to prescribing these procedures—for example, through ownership of the facilities used for the procedures or as a result of receiving payments from companies that make drugs and devices used in those procedures.

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- Large numbers of physicians not meeting basic standards in caring for their patients—for example, not giving appropriate blood tests to their diabetic patients, thus exposing these patients to the risk of complications or even death.
- Millions of dollars wasted by Medicare paying fraudulent bills, similar to the more than $76 million in claims based on prescriptions by *deceased* doctors documented in a July 9, 2008, report by the U.S. Senate Permanent Subcommittee on Investigations.

Under FOIA, a Federal agency may refuse to release records, like the claims records CHECKBOOK/CSS requested, if the disclosure would constitute a "clearly unwarranted" invasion of personal privacy. If a court determines that a substantial privacy interest is at stake, the court must then consider whether the public interest in disclosure outweighs the individual privacy concerns. The relevant public interest a court must consider is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know "what their government is up to."

The majority of the Court's three-judge panel decided that physicians had a substantial privacy interest in not having the claims data publicly disclosed because the data could be used, along with a publicly available Medicare fee schedule, to calculate a physician's total income from Medicare. The majority believed that making such information accessible would violate an important privacy interest even though at most the records would reveal a physician's gross income from Medicare and would not include income from other sources nor reveal net income after allowing for various medical practice expenses—and even though what is at issue is only reimbursement from a government program in which the physicians voluntarily agreed to participate.

"The inexplicable thing about the majority's opinion," according to Robert Krughoff, president of CHECKBOOK/CSS, "is that the two judges in the majority didn't understand, or acknowledge, any counter-balancing public benefit that would result from allowing the public access to the requested data. Not only CHECKBOOK/CSS but also a wide range of other organizations and experts recognize the tremendous value of the information, including the diverse group of organizations that went to the effort and expense of filing amicus briefs supporting CHECKBOOK/CSS: AARP, Center for Medicare Advocacy, Consumers Union (publisher of Consumer Reports), National Business Group on Health, Pacific Business Group on Health, and Judicial Watch."

Judge Judith Rogers, the third member of the D.C. Circuit panel disagreed with the two-judge majority, finding "a commanding and important public interest in disclosure of the data" CHECKBOOK/CSS seeks. In her dissent, she further wrote:

"The crux of the court's determination today that physicians' privacy interests outweigh the public interest in disclosure is its conclusion that the requested data cannot assist the public in assessing either the quality of Medicare services or HHS's efforts to combat fraud and waste. . . . In reaching this conclusion the court overstates the inviolability of the privacy interest and overlooks the near undeniable fact that the requested data can be of some assistance to the public's evaluation of how HHS is carrying out its initiatives aimed at measuring and improving health care quality and its efforts to combat Medicare fraud and waste."

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